

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2020-263-E - ORDER NO. 2022-361
MAY 19, 2022

IN RE: Cherokee County Cogeneration)	ORDER GRANTING THE PETITION
Partners, LLC,)	OF DUKE ENERGY CAROLINAS,
Complainant/Petitioner v. Duke)	LLC FOR EXPEDITED
Energy Progress, LLC and Duke)	ACCOUNTING AND TRUE-UP AND
Energy Carolinas, LLC,)	ENTITLEMENT TO LETTER OF
Defendant/Respondent)	CREDIT

I. INTRODUCTION

The Commission issued Order No. 2021-604¹ on August 27, 2021, to resolve Docket No. 2020-263-E, the Complaint of Petitioner, Cherokee County Cogeneration Partners, LLC (Cherokee), against Respondent, Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC).² Paragraphs 15 - 17 of Order 2021-604 state:

15. The Commission finds that there is insufficient information in the record to make a determination on the amount or existence of any overpayment, underpayment, or need for true up in the public's interest and that of the DEC rate payer. Therefore, the Commission requires an additional proceeding to determine any overage or underage in rates that may have resulted from extensions of the 2012 contract terms between the parties since January 1, 2021, and we

¹ See also Order No. 2021-680.

² It is noted that following the Commission's decision in this matter, Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) submitted a Status Update to the Commission, dated February 16, 2022, advising that:

DEC is pleased to inform the Commission that Cherokee has repaid the full amount of the overpayment. As outlined in the Company's Petition, DEC will be able to return the overpayment to customers as part of the 2022 fuel case.

retain jurisdiction of this docket for future proceedings and determinations.

16. We find it is just and reasonable to require DEC to file a petition for an accounting and true-up of rates paid from January 1, 2021 until the beginning date of the new PPA, as well as any other remedy related to an alleged discrepancy between the avoided cost rates paid by DEC to Cherokee on or after January 1, 2021, and during the extension of the 2012 PPA.

17. We find it is just and reasonable to require DEC to file this petition no later than thirty (30) days from the entry of the successor PPA with Cherokee, or within forty-five (45) days from the service of this Order, whichever occurs first.³

Following Order No. 2021-604 and the denial of reconsideration in Order No. 2021-680, DEC filed a Petition for Expedited Accounting and True-Up (the “Petition”), requesting that this Commission enter an order, on an expedited basis, approving DEC’s Accounting of the overpayment of rates paid to Cherokee from January 1, 2021 through December 31, 2021. With its Petition, DEC asks the Commission to resolve the final issue in this Complaint proceeding—a true-up of the rates DEC paid to Cherokee during the 2021 calendar year pursuant to extensions of the power purchase agreement (“PPA”) executed by the parties on June 28, 2012 (the “2012 PPA”)⁴ as compared to the September 2018 rates set forth in Hearing Exhibit 14 and approved in Order No. 2021-604 and Rehearing Order No. 2021-680. DEC contends that it has overpaid Cherokee in the amount of \$3,048,041, as presented in the Accounting, a copy of which was attached as Exhibit B to this Petition for Accounting filed by DEC.

After reviewing the Accounting, and considering the positions of the parties and ORS, the Commission concludes that the record supports DEC’s Accounting calculation

³ Order No. 2021-604, ¶15, ¶16, and ¶17, pp. 37-38.

⁴ The 2012 PPA was approved by the Commission in Order No. 2012-743.

and finds that Cherokee is liable and responsible to reimburse DEC for excess payments in the net amount of \$3,048,041. Additionally, the Commission finds that DEC is entitled, and authorized, to payment, reimbursement and/or collection of the net sum amount of \$3,048,041 from Cherokee. DEC is further granted the authority from the Commission to seek and obtain payment for the net sum amount of \$3,048,041 from the Letter of Credit No. 04161635, or any other means allowed by law.

II. FACTS AND PROCEDURAL HISTORY

The facts leading up to the issuance of Order No. 2021-604, filed on August 27, 2021, are set forth in that order. Following issuance of the order, Cherokee elected to pursue an agreement with DEC based upon the establishment of a LEO on September 17, 2018. *See* Notice Regarding Legally Enforceable Obligation Election, filed by Cherokee on September 7, 2021. DEC/DEP and Cherokee then filed petitions for rehearing or reconsideration of Order No. 2021-604; Cherokee responded to DEC/DEP's petition; DEC/DEP responded to Cherokee's petition; and ORS filed correspondence regarding Cherokee's election and the petitions for reconsideration. DEC/DEP and Cherokee also filed correspondence addressing the status of the 2012 PPA, and Cherokee filed correspondence indicating the parties "are not in a position to 'execute any successor PPA'" as anticipated in Order No. 2021-604 until the Commission can provide clarification of its order. (Cherokee correspondence dated September 27, 2021.)

The Commission extended the terms of the 2012 PPA between DEC and Cherokee in Order Nos. 2020-846 and 2021-294. In the second of these Orders, Order No. 2021-294, the Commission recognized that the extensions were likely to result in an overpayment to Cherokee during 2021 and held that "Cherokee should bear the economic risk of any

possible overpayment from any extension of the 2012 PPA.”⁵ In Order No. 2021-604, entered on August 27, 2021, the Commission provided a pathway for final resolution of the issues raised in this Docket, finding that Cherokee established a legally enforceable obligation (“LEO”) with DEC on September 17, 2018 and ordering Cherokee to notify DEC whether it chose to be paid rates pursuant to the LEO or rates effective as of January 1, 2021. The Commission directed DEC to file “a petition for an accounting and true-up of rates paid [to Cherokee],” following execution of a successor PPA, to account for the “discrepancy between the avoided cost rates paid by DEC to Cherokee on or after January 1, 2021, and during the extension of the 2012 PPA” between DEC and Cherokee.⁶ The Commission further directed that such petition should be filed “no later than thirty (30) days from the entry of the successor PPA between Cherokee and DEC, or no later than forty-five (45) days from the service of [the] Order, whichever occurs first.”⁷

Both Cherokee and DEC filed Petitions for Reconsideration or Rehearing, asking the Commission to reconsider or clarify its Order, directing the methodology that should be used to calculate DEC’s avoided cost rates as of September 2018. In Order No. 2021-680, entered on October 12, 2021, the Commission clarified that the applicable September 2018 avoided cost rate was set forth in Hearing Exhibit 14 (the Companies’ Late-Filed Exhibit 1).⁸

On October 22, 2021, Cherokee filed a second Petition for Rehearing and/or Reconsideration, and on November 10, 2021, the Commission again confirmed that “there

⁵ Order No. 2021-294, p. 2.

⁶ Order No. 2021-604, pp. 41-42 (Ordering Paragraph 10).

⁷ *Id.*

⁸ Order No. 2021-680, p. 8 (“By way of clarification, . . . we direct the parties to DEC and DEP’s Late Filed Exhibit 1 . . . designated as Hearing Exhibit 14, which sets out DEC’s avoided cost rate.”).

is a reasonable basis supported by substantial evidence in the record for the Commission's decision and adoption of the Avoided Energy Rate set forth in Hearing Exhibit No. 14.”⁹

a. Duration of Overpayment

DEC's Petition addresses the status of negotiations of a successor PPA as well as DEC's and Cherokee's agreement to terminate operations under the extended 2012 PPA as of December 31, 2021. On October 8, 2021, DEC filed a letter in this Docket informing the Commission that, in the absence of execution of a successor PPA, it would not be able to meet the then-upcoming October 11, 2021 deadline for filing an accounting petition to encompass the total overpayment to Cherokee for dispatched energy since January 1, 2021. DEC represented that it had circulated a draft successor PPA to Cherokee on September 23, 2021, and, according to DEC, Cherokee indicated that it was not prepared to enter into formal negotiations until issuance of a final Commission Order on its Petition for Reconsideration.¹⁰ By letter dated December 30, 2021, DEC informed the Commission that Cherokee had terminated efforts to negotiate a successor PPA with DEC, and instead would begin merchant operations effective January 1, 2022. Accordingly, DEC's Petition explains that DEC and Cherokee terminated the parties' operation under the extended 2012 PPA effective as of December 31, 2021.

⁹ Commission Directive dated November 10, 2021, p. 1.

¹⁰ DEC's Petition for Expedited Accounting and True-Up, dated January 21, 2022, ¶6, p. 5.

b. Security Held by DEC for Cherokee's Overpayment Obligations

Pursuant to DEC's letters filed with the Commission on September 10, October 8, and December 30, 2021 and DEC's Petition, the Commission understands that Cherokee executed and provided to DEC a \$3 million Letter of Credit as security to partially cover its overpayment obligations, and that the Letter of Credit was set to expire on February 21, 2022 at the time of the Petition. In addition, DEC's Petition explains that DEC is holding an additional \$3,375,267 in security to mitigate risks to its customers, including \$3 million withheld from Cherokee's August 2021 invoice and \$375,267 withheld from Cherokee's December 2021 invoice.

c. Accounting and True-Up

According to DEC's submissions, DEC has overpaid Cherokee in the amount of \$3,048,041 during the Accounting period. This amount reflects the \$6,423,308 difference between the rates applicable to capacity and energy dispatched from the Cherokee Facility from January 1, 2021 through December 31, 2021 under the 2012 PPA of \$12,567,171 as compared to the September 2018 pricing the Commission has ruled was actually due to Cherokee based upon DEC's avoided costs during this period of \$6,143,863, less the \$3 million DEC withheld from Cherokee's August 2021 invoice as security and an additional \$375,267 withheld by DEC for Cherokee's December 2021 invoice, which DEC is holding as further credit against the overpayment:

2012 PPA Rate (1/21-12/21):	\$12,567,171
Sept. 2018 Pricing (1/21-12/21):	<u>-\$6,143,863</u>
	\$6,423,308
	\$6,423,308
Aug. 2021 Withholding:	\$3,000,000
December Invoice Withholding:	<u>-\$375,267</u>
TOTAL OVERPAYMENT:	\$3,048,041

DEC contends in its Petition that the Commission's expedited consideration of its Petition is needed in light of the imminent expiration of the \$3 million Letter of Credit on February 21, 2022 to ensure that DEC's customers are appropriately protected from potential default by Cherokee and reimbursed for the overpayments made to Cherokee since January 1, 2021 pursuant to the Commission's extension of the 2012 PPA rates. DEC filed the Letter of Credit as Exhibit A to the Petition. Further, DEC notes in the Petition that, if Cherokee refunds the overpayment amount prior to May 31, 2022 – i.e., the end of the 2021-2022 review period for the 2022 DEC fuel case – DEC will be able to return the overpayment to customers as part of the 2022 DEC fuel case.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record, the Commission finds and concludes:

(1) As a threshold matter, the Commission concludes that expedited consideration of DEC's Petition is reasonable and appropriate.

(2) As of December 31, 2021, DEC and Cherokee have discontinued operating under the terms of the 2012 PPA, and Cherokee has now commenced merchant operations effective January 1, 2022. Accordingly, DEC will not make any further payments to

Cherokee for energy dispatched from the Cherokee Facility under the Commission-ordered extensions of the 2012 PPA, and the overpayment amount is now final.

(3) The Commission notes that the \$3 million Letter of Credit—which DEC holds as security to ensure its customers are made whole from the overpayment to Cherokee—is set to expire on February 21, 2022.

(4) The Commission’s expedited decision in this matter will, when combined with prompt repayment by Cherokee, allow the parties to avoid the need for either (a) DEC to make a draw on the Letter of Credit; or (b) Cherokee to obtain a further extension of the Letter of Credit.

(5) With respect to DEC’s Accounting, this Accounting appropriately reconciles the amounts DEC paid to Cherokee for capacity and energy from the Cherokee Facility using the 2012 PPA rates against the amounts owed to Cherokee under DEC’s avoided cost rates, as determined by the Commission in Order No. 2021-604 and subsequent orders on rehearing and reconsideration (i.e., the October 2018 avoided cost rates set forth in Hearing Exhibit 14 calculated based on the September 2018 LEO and the Commission-approved methodology).

(6) The Accounting accurately reflects the total overpayment DEC made to Cherokee in the 2021 calendar year.

(7) Cherokee is liable and responsible to reimburse DEC for excess payments in the net amount of \$3,048,041.

(8) DEC is entitled to payment, reimbursement and/or collection of the net sum amount of \$3,048,041 from Cherokee.

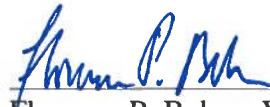
IV. ORDERING PARAGRAPHS

IT IS THEREFORE ORDERED:

- (1) DEC's Petition for Expedited Accounting is granted.
- (2) DEC overpaid Cherokee during the period of January 1, 2021 through December 31, 2021 in the amount of \$3,048,041, which is the net of the amounts withheld by DEC under prior invoices as security as detailed in the Petition.
- (3) DEC is authorized to seek and obtain payment for the net sum amount of \$3,048,041 from the Letter of Credit No. 04161635, or any other means allowed by law.
- (4) DEC shall return the full overpayment amount to customers as soon as reasonably practicable.
- (5) This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:





Florence P. Belser, Vice Chair
Public Service Commission of
South Carolina